STATE OF ILLINOIS

ILLINOIS COMMERCE COMMISSION

Illinois Commerce Commission On Its Own Motion Adoption of 83 Ill. Admin. Code 550, "Non-Discrimination in Affiliate Transactions for Gas Utilities"	)	Docket No. 00-0586

ILLINOIS POWER COMPANY'S VERIFIED COMMENTS ON THE PROPOSED RULES

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STATE OF ILLINOIS
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Pursuant the schedule adopted in the above-referenced proceeding, Illinois Power Company ("Illinois Power" or "IPC") hereby submits its Comments to the Commission's proposed rules for non-discrimination in affiliate transactions for gas utilities ("gas affiliate rules").[1]

I. SUMMARY

As a combination utility with a strong interest in the development of competitive markets in both electric and natural gas industries, Illinois Power supports the Commission's decision to develop and promulgate gas affiliate rules before the advent of widely-available competition in the gas industry but at a time when large-scale pilot programs are starting to bring about competition.[2] Illinois Power also applauds the Commission for starting essentially with the same rules as

[1] Illinois Power's Comments respond to the latest version of these rules provided by Staff after the last workshop held in this matter.

[2] *See, e.g., Northern Illinois Gas Co. d/b/a Nicor Gas Co.*, ICC Dkt. Nos. 00-0620 & 00-0621 (relating to Nicor's Customer Select Pilot Program).

it finally adopted for electric utilities ("electric affiliate rules").[3] This beginning is encouraging for two important reasons. First, although the initiating order is not expositive on the issue, parties will (and should) assume that the same fundamental, pro-competitive rationale that underlies the electric affiliate rules forms the foundation for the gas affiliate rules. Second, for combination utilities, such as IPC, the use of similar rules for both sides of the business will not only control the cost of compliance, but also, more importantly, help ensure compliance by easing employee confusion as they address different customers (some of whom are electric only or gas only and some of whom take both services from IPC) and customer situations (some of which may involve only one side of the business or both). Similarly, customers will not be left to wonder why a different outcome was reached when they had an electric issue as opposed to a gas issue. Illinois Power does, however, have a few concerns with some of the proposed rules, especially where they are not consistent with the electric affiliate rules in areas where a lack of uniformity does not appear to be required by current law.

II. ILLINOIS POWER COMPANY

Illinois Power Company is a combination gas and electric utility serving over 580,000 electric customers and 400,000 gas customers. Illinois Power was instrumental in bringing about the legislative change that is opening up the State's electric markets to competition. Since that legislation was enacted, IPC's parent company merged with Dynegy Inc. ("Dynegy"), a corporation that engages in electric generation, electric trading and marketing, as well as gas trading and marketing, among other activities. Both IPC and Dynegy have been active participants in the development of competition in the formerly regulated gas and electric industries. Both companies support rules that will advance the opening of markets to

[3] 83 Ill. Admin. Code Part 450, *aff'd*, *Illinois Power Co. v. ICC*, 316 Ill.App.3d 254, 736 N.E.2d 196 (5th Ill. App. Ct. 2000).

competitive forces. And, both companies do not believe it is in the best interests of utilities, customers or new market entrants to create rules that are unnecessarily costly or that create substantial risks of non-compliance due to the overlapping and conflicting regulatory regimes.

III. THE ELECTRIC AFFILIATE RULES

Because they form the genesis of the gas affiliate rules, we begin by revisiting the rationale behind the electric affiliate rules. The electric rules were mandated by the Customer Choice Law. *See* 220 ILCS § 5/16-121. The Commission promulgated these rules after a thorough vetting of the issues by all parties. Although no party received everything it requested, the Commission did start its analysis from the proper perspective:

> The Commission has reviewed the extensive record of evidence and testimony, as well the proposals of the parties and concludes that, at this point in the evolution of competition in the Illinois energy market, an approach which only imposes restrictions on the relationship between utilities and their affiliated interests where necessary is warranted. This view is supported by substantial evidence. *The Commission agrees with the assertions of many utility witnesses that enhancing consumer welfare must be the benchmark of any deregulatory scheme and that consumer welfare is enhanced when prices are low and products are varied and plentiful.* The Commission agrees further with witnesses Landon and Kahn, that the only real way to test a market is to observe it over a reasonable period of time and to draw conclusions based upon empirical observations. Through these observations, the Commission hopes to develop over time a better understanding of where restrictions are or are not needed.
>
> In addition, the proposals of parties suggesting strict regulation were subjected to convincing criticism. Rather than judging the market by consumer welfare standards, the parties proposing strict regulation looked to the number of market participants as the most prominent feature of a well functioning market. In accordance with this view, the rules under this proposed regime were uniform in attempting to "level the playing field" to offset the perceived advantages possessed by the various regulated electric utilities. This generally called for the installation of a layer of insulation between the incumbent and its affiliates that resulted in imposing costs on the incumbent that would not be borne by new entrants, despite the fact that the new entrants could include affiliates of companies who were regulated in different jurisdictions. There was no plausible reason given for disparate treatment of similarly situated entities at the onset of competition.

Electric Affiliate Rules Order at 25 (June 12, 1998) (emphasis supplied). With the advent of more competition in the gas arena, the same pro-competitive rationale should be extended to the gas affiliate rulemaking. There are, of course, some specific legal requirements that will dictate different outcomes on a few issues. But, Illinois Power urges the Commission to deviate from the electric affiliate rules only in those instances where required to by law.[4]

Not only is the rationale for the electric affiliate rules sound, in practice, those rules appear to have been (1) workable for utilities and their affiliates, and (2) sufficient to deter the anti-competitive behavior that formed the basis for needing such rules. As far as Illinois Power is aware, in the more than two years since the electric affiliate rules have been in effect, there have been no formal complaints to the Commission by any customer, marketer or public interest party (such as the Staff or other governmental parties) in regard to potential violations of the rules by an electric utility or by any electric utility in regard to the burdens imposed by the rules.

IV. SPECIFIC COMMENTS

Once adopted, combination utilities, such as IPC, will have two sets of state affiliate rules by which to abide. Consistency between the two sets of rules will help ensure cost-effective compliance. And, in general, the rules proposed by the Commission go a long way toward providing consistency. IPC understands that, in certain places, differences must exist between the rules because of differences in the law. For example, the gas affiliate rules use of the new term "alternative retail gas supplier" in place of the term "alternative retail electric supplier" because the latter is a defined term in the PUA relating solely to the electric side of the business. There are, however, a few places where, for whatever reason, the gas affiliate rules differ from

[4] Illinois Power understands that some may question the Commission's authority to issue any gas affiliate rules absent specific statutory language (which currently does not exist). If these concerns prove dispositive, we would be willing to work with all interested parties to help craft, and seek passage of, appropriate legislative language.

the electric affiliate rules for reasons that do not appear to be related to the law. In these places, Illinois Power urges the Commission to amend the rules to create uniformity between the two sets of rules.[5]

In several places, the gas affiliate rules use the term "affiliated interest" where the electric affiliate rules use the term "affiliated interests in competition with ARES" (which is the equivalent of the term "affiliated interests in competition with ARGS"). *See, e.g.*, §§ 550.30(a) & (b), 550.40. The Commission specifically limited the electric rule analogs to affiliated interests in competition with ARES, *see, e.g.*, Electric Affiliate Rules Order at 8-10 & 18 (Sept. 14, 1998) (for example, with respect to the tying provision, the Commission stated it was modifying the rule to "limit the tying prohibition to delivery services and *affiliated interest in competition with ARES*;" emphasis supplied). Absent a compelling rationale for this deviation, the analogous term should be used in the gas affiliate rules.

In particular, we remain deeply disappointed that § 550.30(a) has not been limited (as the parallel provision in the electric affiliate rules is) to those utility affiliates in competition with retail commodity suppliers. Illinois Power understands the need for appropriate restrictions on a utility's joint marketing and advertising with certain affiliates. As the Commission is aware, this issue was a very contentious one in the electric rules and the Commission struck a balance on what joint marketing and advertising should be permitted. Deviating from that result without any evidentiary basis for doing so is inappropriate. The extensive record in the electric rulemaking case (as well as the extensive electric deregulation legislation) did not support a broader prohibition on joint marketing and advertising. Furthermore, for combination electric-gas utilities (such as IPC), the prohibition of such joint activity when performed by the "gas utility"

[5] We have attempted to note each such instances below, to the extent we have missed one, we nonetheless would recommend the appropriate change in those overlooked places as well.

when the same activity performed by the "electric utility" is acceptable will cause confusion and could put combination utilities at a disadvantage *vis-a-vis* electric-only utilities.

On a different topic, the rules should be clarified to provide guidance to the parties. The PUA currently does not address customer information in the gas context with the specificity that it does in the electric context. *See* § 16-122. Due to this, we agree that provisions relating to generic customer information should be deleted. However, to avoid confusion on what customer information is at issue, we recommend that the Commission amend the proposed rule to state "Gas utilities shall not provide any preferences to affiliated interests in requesting authorization for the release of customer **billing and usage data**." The bolded language will make the scope of the rule consistent with the scope of the electric rule (which ties back to § 16-122(a), which uses the phrase "billing and usage data"). In addition, this clarification will help all parties understand the scope of the rule.

Finally, IPC notes that in altering the biennial audit requirement to begin in 2002, the draft rule was not changed to make the subsequent audits be in "even" numbered years (it currently reads "odd"). *See* § 550.150(b). This oversight should be corrected. With this correction, the audits in several rules will be synchronized. *See, e.g.*, 83 Ill. Admin. Code §§ 416.30 (electric accounting rules), 450.150(b) (electric affiliate rules) 506.30 (gas accounting rules).

V. CONCLUSION

Illinois Power is encouraged that the Commission is taking steps as competition in the retail gas industry unfolds to address potential incumbent-affiliate abuses. We are also encouraged that the Commission has started its analysis where it began the electric affiliate rule analysis—with consumer welfare as the touchstone. There are, however a few proposed rules that should be slightly amended to better fit with the electric rules. IPC's proposed changes will help ensure that combination utilities have uniform rules to follow, to the extent possible under current law, and that their customers are not confused by different rules being applied to them depending on whether a gas or electric issue is at hand.

WHEREFORE, Illinois Power requests that the Commission amend the first notice proposed rules as set forth in Section IV, above.

Respectfully submitted,

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Dated: February 9, 2001

VERIFICATION

I, Brian W. Blackburn, Supervisor-Gas Sourcing, being sworn on oath, state that the foregoing Illinois Power Company's Comments on the Proposed Rules are true and accurate to the best of my knowledge, information and belief.

Brian W. Blackburn
Brian W. Blackburn

Subscribed and sworn to before me this 9th day of February, 2001.

Laura A. Krohe
Notary Public

OFFICIAL SEAL
LAURA A. KROHE
NOTARY PUBLIC, STATE OF ILLINOIS
MY COMMISSION EXPIRES 1-13-2002

CERTIFICATE OF SERVICE

I, Joseph L. Lakshmanan, certify that on the 9th day of February, 2001, I served a copy of Illinois Power Company's Verified Comments on the Proposed Rules by first class mail, from Decatur, Illinois, postage prepaid to the individuals on the service list attached.

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